IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEALS NO. 47 and 48 of 2001.

Vithoba N. Adel,
C/o Proprietor,
M/s. Rajesh Roadways
Corporation,
Near Hari Mandir,
Margao, Goa. ... Appellant.

Versus

1. Vijaya Bank,
A body corporate
constituted under the
Banking Companies
(Undertaking and Transfer)
Act, 1917, with its Head Office
At Bangalore and its Branch
Office at Margao, Goa,
represented by its Branch
Manager, Shri Vallie D'Souza
of Margao Branch.

2. Tukaram Dhurbkatkar,
Quitulla, Aldona,
Aldona, Goa.

3. P.G.C. Tharagan
Deccan Tyres,
Near Rajendra Prasad Stadium,
Margao, Goa (since deceased
(through legal heirs):

3a) Smt. P.G.C.Tharagan ,
Deccan Tyres,
Near Rajendra Prasad Stadium,
Margao, Goa.

3b) George Tharagon,
Deccan Tyres,
Near Rajendra Prasad Stadium,
Margao, Goa.

3c) John Tharagon,
Deccan Tyres,
Near Rajendra Prasad Stadium,
Margao, Goa. ... Respondents.

Shri S.S. Kakodkar, Advocate for the Appellant.

Shri M.S. Joshi, Advocate for the Respondents.

CORAM: S.A. BOBDE &
N.A. BRITTO, JJ.

DATE: 6TH JULY, 2004.

ORAL JUDGMENT: (**Per Bobde, J**.)

These First Appeals are filed by the original defendant No.1 (hereinafter referred to as the defendant) against the judgment and decree of the Ist Addl. Civil Judge, Senior Division, Margao . By the judgment and decree in appeal the learned Civil Judge has decreed the suit of the respondent-Bank together with interest and future interest. The appellant's counter claim has been dismissed.

2. The parties are hereinafter referred to as per their status before the Trial Court.

3. On 21.1.1988 the plaintiff-Bank filed a suit for recovery of a sum of Rs.3,75,144, a sum inclusive of interest till the date of filing of the suit and for future interest from the date of filing of the suit till

realisation. On 16.1.1989 most of the defendants were served. On 16.8.1989 all the defendants including the heirs of the deceased defendant stood served. The defendants did not file their written statement soon after service. They filed it on 24.1.1994. In the written statement, without pleading any set-off, the defendant no.1 made a counter claim for compensation in the sum of Rs.21,28,000/- and for damages in the sum of Rs.50,800/- with interest at the rate of 18% per annum. The defendants prayed for other compensation with interest at the rate of Rs.1000/- per day.

4. The plaintiff-Bank has filed the suit for recovery of the loan advanced to the defendant . In the written statement the defendant has not admitted his liability but has taken the usual plea that the documents such as promissory note etc. have been executed by him (defendant) due to coercion by the Bank, in advance.

5. The defendant's counter claim is based on the transactions pertaining to hypothection of certain vehicles in pursuance of the loan. Two trucks and a car were hypothecated under various agreements. According to the defendant, he had fully repaid the loan in respect of one truck and the car. The loan apparently remained unpaid in respect of one truck bearing No.GDZ-5104. This truck was seized on 21.2.1985. The other vehicles were seized about a month later on 19.3.1985. According to the defendant, the seizure of

the vehicles in question was unjustified and illegal and deprived the defendant of income from the trucks. The defendant also claimed compensation on the ground that the vehicles were returned on 7.1.1986 in a damaged condition; they were without important parts. The defendant claimed compensation for being unable to ply such vehicles from the date they were illegally seized i.e. From 21.2.1985. Thus, according to the defendant, the cause of action for the counter claim arose on 21.2.1985. As stated earlier, the defendant's counter claim has been dismissed and the plaintiff-Bank's suit has been decreed.

6. Mr.Kakodkar, the learned counsel for the defendant, raised two contentions against the judgment and decree of the trial Court. Firstly, according to the learned counsel, the defendant having filed a counter claim which was for a sum of about Rs.22,00,000/ had the effect of raising the value of the subject matter of the lis to more than Rs.10,00,000/- i.e. the pecuniary limit upto which actions for recovery by a Bank or a Financial Institution can be tried by a Civil Court. Therefore, according to the learned counsel the suit before the Civil Judge, Senior Division stood transferred to the Debt Recovery Tribunal by virtue of the provisions of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (hereinafter referred to as R.D.D.B.F.I. Act).

7. Secondly, according to the learned counsel the learned Trial Court committed an error in decreeing the Bank's claim without properly appreciating that the statement of account had not been proved by the Bank.

8. On the other hand, the learned counsel for the plaintiff submitted, while supporting the judgment and decree that the Trial Court was right in dismissing the counter claim particularly on the ground of limitation.

9. Thus, three points arise for determination in these appeals. Firstly, whether the Trial Court had jurisdiction to try the suit in view of the counter claim of the defendant which was for a sum greater than Rs.10,00,000/- or whether the Civil Court had no jurisdiction and the suit stood transferred by operation of law under Section 31 of R.D.D.B.I. Act.

Secondly, whether the defendant's counter claim was barred by limitation;

and Thirdly, whether the decree passed by the learned Civil Judge S.D. is otherwise sustainable.

10. As regards the first point, there is no dispute that the suit filed by the Bank is for a sum less than Rs.10,00,000/- being for

recovery of a sum of Rs.3,75,144/- with interest thereon.

Section 1, sub-section (4) of R.D.D.B.F.I. Act reads as follows :-

> " (4) The provisions of this Act shall not apply where the amount of debt due to any bank or financial institution or to a consortium of banks or financial institutions is less than ten lakh rupees or such other amount, being not less than one lakh rupees, as the Central Government may, by notification, specify.

11. Therefore it is clear that the suit by itself is tr"iable by a Civil Court and is not liable to be transferred to the Debt Recovery Tribunal.

12. The question is whether the Civil Court had no jurisdiction to try the suit be cause of the counter claim for a sum of more than ten lakh rupees having been filed by the defendant. It is clear that a defendant to an application is entitled to plead a set-off and also set up a counter claim by virtue of sub-section (8) to section 19 of the R.D.D.B.F.I. Act . Section 19 to the extent it is

relevant reads as follows :-

> " 19. Application to the Tribunal
>
> (1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within thelocal limits of whose jurisdiction -
>
> (a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carried on business, or personally works for gain; or
>
> (b) any of the defendnts, where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or
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> © the cause of action, wholly or in part, arises.
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> (8) A defendant in an application may, in addition to his right of pleading a set-off under sub-section (6), set up, by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant eiher before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

13. We are of view, having regard to the provisions of the R.D.D.B.F.I. Act that the counter-claim does not have the effect of

removing the suit from the jurisdiction of the Civil Court to the Debt Recovery Tribunal for the following reasons:-

14. In the first instance what needs to be taken into account is the suit or the claim itself. The suit is clearly triable by the Civil Court being for recvery of a sum less than rupees ten lakhs and therefore not barred by the provisions of the Act . In fact the R.D.D.B.F.I. Act has no application to such a suit vide sub-section (4) of section 1 which reads as follows :-

> " (4) The provisions of this Act shall not apply where the amount of debt due to any bank or financial institution or to a consortium of banks or financial institutions is less than ten lakh rupees or such other amount, being not less than one lakh rupees, as the Central Government may, by notificaltion, specify. ""
> "

15. Secondly, even though the defendant was entitled and is entitled in law to claim a set-off or to set up a counter-claim such a counter-claim would not have the effect of removing the lis from the jurisdiction of the Civil Court because it would not be a counter-claim "in an application " by a Bank. Now, application has been defined by section (2)(b) as follows :-

> " application" means an application made to a Tribunal

under section 19; “

Section 19 enables a Bank or financial institution to make an application to the Tribunal for recovery of a debt in the circumstances and in the manner prescribed therein. It is thus clear that the counter-claim is not a counter-claim to an application made by the Bank but is, on the other hand, a counter claim made by a person who is not entitled to invoke the provisions of the R.D.D.B.F.I. Act. It may be noted that this Act was enacted for expeditious adjudication and recovery of debts due to Banks and financial institutions (emphasis supplied). Thus on the basic principle that it is the plaint or the initial action that must determine the jurisdiction and not the response to that action, we are of view that a counter-claim made by a person other than a Bank or financial institution for a sum greater than ten lakh rupees would not have the effect of removing the lis in which such claim is made, from the jurisdiction of the Civil Court. We are satisfied that no illegality would ensue as a result of this view since the suit filed by the Bank in the present case is clearly within the jurisdiction of the Civil Court being for an amount less than ten lakh rupees; and so is the counter-claim, being one filed by a person which is not a Bank or a financial institution and who is required by law to approach a Civil Court for redress. We are fortified in this view by the fact that a counter-claim is regarded by the Code of Civil Procedure as a plaint vide Order 8 Rule 6-A. Sub-Rule (4) provides

that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. The R.D.D.B.F.I. Act treats a counter-claim in the same fashion vide sub-section (9) to section 19 which reads as follows :-

" (9) A counter-claim under sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

If the defendant had to recover damages independently, it would have to file a suit for damages in a Civil Court."

16. It is true that sub-section (9) is intended to enable a Tribunal to try a Bank's claim and the counter-claim unitively, but this provision would have no application where the initial action by the Bank is outside the purview of the Debt Recovery Tribunal and within the jurisdiction of the Civil Court.

17. Mr. Kakodkar, the learned counsel for the defendant relied on a decision of the Supreme Court of India in (2000) 7 S.C.C. 357 in the case of **United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. And others** in support of the proposition that a counter-claim filed by a Bank or financial institution is liable to be treated as a cross-suit and must herefore be dealt with

simultaneously with the main suit by the bank. We are satisfied that the said case has no application to the present case. In that case the suit filed by the Bank of financial institution, to which the Company's , suit was treated as a counter-claim and a cross-suit, was clearly triable by the Debt Recovery Tribunal being one for recovery of a sum of Rs.31.18 crores vide paragraph 2 of the report. That crucial factor i.e. jurisdiction of the Debt Recovery Tribunal, to try the Bank's claim is absent in the case before us.

18. The learned counsel for the defendant relied on the decision of a learned Single Judge of this Court in **Dr. Shravan Jairam Jadhav v. State Bank of India & Ors.** Reported in 2001 (2) All MR. 494. That was a case in which, relying on Order 8 Rule 6A (2) of Code of Civil Proceldure the learned Single Judge came to the conclusion that both the suit and the counter-claim were required to be decided simultaneously and the counter-claim cannot be divorced from the original claim. That decision also has no application since it is obvious from the report vide para 3 that the suit was filed by the bank for recovery of Rs.12,53,586.55 i.e. for more than 10 lakh rupees.

In the view we have taken the decision has no application to the facts of the present case.

19. Turning to the second point for determination; what has to be seen is whether the defendant's counter claim is barred by limitation. As stated earlier, the counter-claim is based on alleged illegal seizure of the defendant's vehicles and the fact that the vehicle when returned along with the other two vehicles were found to have been incapable of functioning due to removal of parts, etc. The cause of action, according to the counter claim, arose on 21.2.1985. The counter-claim itself is filed on 24.1.1994, almost nine years after the cause of action arose. The counter-claim contains an averment that it is in regard to a continuous wrong or tort.

20. Mr. Kakodkar, the learned counsel for the defendant raised a preliminary objection to this Court entertaining such a plea of limitation. According to the learned counsel since the question of limitation was not raised by the plaintiff before the Trial Court, it cannot be raised now in appeal.

21. Mr. Joshi, the learned counsel for the plaintiff relied on a decision of the Supreme Court in **Rama Shankar Singh and another v. Mst. Shyamlata Devi and others (A.I.R. 1970 S.C. 716)** . In a similar situation the Supreme Court upheld the decision of the High Court in allowing the defendant to raise a point of limitation though the plea was not take in the written statement.

Moreover it is clear from Section 3 of the Limitation Act that it is the duty of the Court trying the suit to see whether the suit is brought within the period prescribed therefor by limitation.

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22. Mr. Kakodkar, the learned counsel for the defendant relied on the judgment of the Supreme Court in **The Municipal Corporation, Indore, v. Niyamatulla (dead) by his legal representatives** (A.I.R. 1971 S.C. 97)"where the Supreme Court observed that a plea that the suit is barred by a special period of limitation provided by Section 135(2) of the Indore Municipal Act 1909 not having been taken in the pleadings and before the Trial Court the same ought not to have bveen allowed to be agitated in appeal by the District Court. That was a case of special period of limitation provided by a statute and the case is not quite in point. The learned counsel also relied on a decision of the Supreme Court in **Smt. Shanti Rani Das Dewanjee v. Dinesh Chandra Day (dead) by L.Rs.** (A.I.R. 1997 S.C. 3985). That case is also not applicable since the question there was whether a suit and counter-claim were barred under the Limitation Act was sought to be raised for the first time before the Supreme Court, even though it was not raised at any time earlier. It is in these circumstances and after observing that the counter-claim was not ex-facie barred by limitation that their Lordships declined to interfere on the ground of limitation.

23. We are of view that the the situation is materially different in first appeal in the High Court where no special plea of limitation is involved, such as in the present case. In such a case we feel that Section 3 of the Limitation Act which expressly applies to suits certainly enables the first appellate court to ascertain whether the suit is barred by limitation, a first appeal being a continuation of the suit.

24. Having regard to these circumstances, the cause of action having arisen as stated in the counter-claim itself on 21.2.1985, we are of view that the counter-claim having been made on 24.1.1994, is clearly barred by limitation being filed beyond 3 years vide Section 55 or Art.113 whichever is applicable. It was also suggested by the learned counsel for the defendant that the cause of action for compensation and damages is a continued tort under Section 32 of the Limitation Act and therefoe the counter-claim is not barred. The learned counsel relied on the decision of the Supreme Court in **Balkrishna Savaram Pujari Waghmare and others v. Shree Dhyaneshwar Maharaj Sansthan and others** (A.I.R. 1959 S.C. 798). That was a matter decided under the same provision of the earlier Limitation Act of 1908.

In that case it was alleged that the defendant had taken possession of the said hereditary office adversely to the plaintiff and was therefore liable to the plaintiff in damages. The Supreme Court

repelled the contention and held that where the wrongful act complained of is complete on the date of ouster, it would not be a continuing wrong. Similarly in the present case, we are of view that the alleged wrongful act of the plaintiff i.e. the illegal seizure of the vehicles and the return of those vehicles in damaged condition are acts which were complete on the respective days and there is no question of a continuing wrong or tort. Whether the date that is taken into account is the date of the illegal seizure i.e. 21.2.1985 or return of the vehicles on 7.1.1986 allegedly in damaged condition, the counter-claim having been filed on 24.1.1994 is clearly beyond any period of limitation that is prescribed. We thus find that the defendant's counter claim is liable to be dismissed on the ground of limitation alone and though the Trial Court is dismissed on another ground, we uphold the dismissal on the ground of limitation.

25. This takes us to the last point i.e. the legality and propriety of the decree passed against the defendant. In that regard, the Trial Court has held the defendant liable to pay to the plaintiff a sum of Rs.3,75,144/- in answer to Issue No.1. Mr. Kakodkar, the learned counsel for the defendant, submitted that the Trial Court did not act properly in ensuring that the defendant admitted that the said amount was due merely because he admitted that he became irregular in making repayment due to the accident caused to the vehicle. This submission of the learned counsel for the

defendant is correct. Indeed, the Trial Court could not have drawn the inference that the defendant has not disputed the claim merely on the basis of an admission that the defendant was irregular in making payment. We have therefore perused the evidence ourselves. It is clear from the evidence and in particular the deposition of the plaintiff's Manager who proved the statementof accounts at Exh.36 that the witness refuted the suggestion of the defendant that since the various deposits on different dates are not shown at the end of each exhibit, they have not been duly accounted for in the final balance. The witness has clearly said that the statement of accounts is properly made in accordance with the practice for calculating simple interest and has categorically asserted that “the deposits made have been duly accounted for for the purpose of calculating interest”. Thereafter it is clear that there is no cross examination on the point and the defendant has not cited any example to the plaintiff's witness to dispute the correctness of the bank's calculation. Even otherwise, it must be borne in mind that the statement of accounts in the present case was clearly a statement governed by the Bankers Book Evidence Act (1891) and such a statement is required to be admitted as evidence of the fact that the amount was due and no further evidence is required unless rebutted. In this view of the matter, we are satisfied that the decree passed by the Trial Court must be upheld and we accordingly uphold the decree.

26. In the result, there is no merit in the defendant's appeals which are hereby dismissed. Parties shall bear their own costs.

S. A. BOBDE, J.

N.A. BRITTO, J.

sl.